UNITED NATIONS

GENERAL ASSEMBLY

Distr:
GENERAL

A/CN.9/345
3 June 1991

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-fourth session
Vienna, 10-28 June 1991

REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS FIFTEENTH SESSION (New York, 13-24 May 1991)

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session, 1/ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit (A/CN.9/316). The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group. 2/

3. At its thirteenth session (A/CN.9/330), the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. The Working Group requested the Secretariat to submit to its fourteenth session a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

4. At its fourteenth session (A/CN.9/342), the Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 7 of the uniform law. The Working Group also considered the issues discussed in a note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a first draft of articles on the issues discussed. It was noted that the Secretariat would submit to the Working Group, at its fifteenth session, a note on further issues to be covered by the uniform law, including fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction.

5. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York, from 13 to 24 May 1991. The session was attended by representatives of the following States members of the Working Group: Canada, Chile, China, Cyprus, Czechoslovakia, Egypt, France, Germany, India, Iran (Islamic Republic of), Iraq, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Nigeria, Singapore, Spain, Togo, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

1/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 22.

2/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

6. The session was attended by observers from the following States: Algeria, Australia, Austria, Bahamas, Brazil, Cape Verde, Colombia, Congo, Ecuador, Finland, Haiti, Honduras, Indonesia, Oman, Pakistan, Peru, Philippines, Poland, Romania, Rwanda, Saudi Arabia, Sweden, Switzerland, Thailand, Tunisia, Uganda, United Republic of Tanzania, Vanuatu, Venezuela, Viet Nam and Yemen.

7. The session was attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Hague Conference on Private International Law, International Monetary Fund (IMF), Banking Federation of the European Community, Cairo Regional Centre for International Commercial Arbitration, International Chamber of Commerce.

8. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. R. Sandoval (Chile).

9. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.69) and two notes by the Secretariat discussing further issues of a uniform law: fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70); conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

10. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a uniform law on international guaranty letters.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

11. The Working Group considered certain issues concerning the obligations of the guarantor. Those issues had been discussed in the note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68) that had been submitted to the Working Group at its fourteenth session but had not then been considered, for lack of time. The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft set of articles on the issues discussed.

12. The Working Group then considered the issues discussed in the note by the Secretariat relating to fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70). The deliberations and conclusions of the Working Group are set forth below in chapters III, IV and V. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft set of articles, with possible variants, on the issues discussed.

13. The Working Group also considered the issues discussed in the note by the Secretariat relating to conflict of laws and jurisdiction

(A/CN.9/WG.II/WP.71). The deliberations and conclusions of the Working Group are set forth below in chapter VI. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft set of articles on the issues discussed.

II. DISCUSSION OF CERTAIN ISSUES CONCERNING THE OBLIGATIONS OF THE GUARANTOR

14. The Working Group continued its deliberations on the obligations of the guarantor and considered the following issues which, for lack of time, it had not considered at its fourteenth session: time allowed for examination, duties of notification, and liability and exemption (as discussed in document A/CN.9/WG.II/WP.68, paras. 58-72).

A. Time allowed for examination

15. The Working Group noted that, under article 10 (a) of the revised text of the ICC Draft Uniform Rules for Demand Guarantees 3/ (URDG), "a Guarantor shall have reasonable time in which to examine a claim under a Guarantee and to decide whether to pay or to refuse the claim". It was understood that, as expressed in that provision, the time accorded to the guarantor was for both related purposes, namely that of examining the claim and of deciding whether or not to pay.

16. There was considerable support for using in the uniform law the formula "reasonable time" as adopted in the above provision. It was stated that this formula was well known in banking practice and that it was sufficiently flexible to accommodate the varied circumstances of individual cases as well as regional or national variations in practice. However, there was some support for providing uniformity and certainty by fixing a number of working or banking days (e.g., three, five or seven). Yet another view was to combine both approaches by according the guarantor reasonable time up to a limit of seven days, as appears to be the currently suggested rule for the future revision of the ICC Uniform Customs and Practice for Documentary Credits (UCP). It was stated in reply that such an upper limit might eventually be regarded as the regular time period and that it might thus extend the time period beyond what is currently the practice, i.e., about three days.

17. The Working Group was agreed that the future provision in the uniform law on the time allowed for examination should not be mandatory. That would permit derogation either by incorporation of rules such as those contained in URDG or UCP or by stipulating a different period of time in the particular guaranty letter.

B. Duties of notification

18. The Working Group considered, on the basis of the discussion set forth in document A/CN.9/WG.II/WP.68 (paras. 61-64), whether the uniform law should contain provisions concerning notice to the principal of a claim, notice to the beneficiary of the rejection of its claim and possible further notifications by financial institutions.

3/ ICC document No. 460/470-1/19 Rev. and 460/470-10/1 Rev. of 8 February 1991.

Notice to the principal of a claim

19. It was noted that the issue of notice to the principal was dealt with in draft article 17 URDG in the following way:

> "Without prejudice to the terms of article 10, 4/ in the event of a claim the Guarantor shall without delay so inform the Principal or where applicable its Instructing Party and in that case the Instructing Party shall so inform the Principal."

20. It was further noted that draft article 17 URDG was apparently not designed to address the problem of "extend or pay" requests since these were dealt with elsewhere, namely, in draft article 26 URDG. It was stated that a rule such as the one contained in draft article 17 URDG would be inconsistent with the practice of stand-by letters of credit as reflected in article 16 UCP. 5/

21. The Working Group was divided on whether the uniform law should impose an obligation on the guarantor to inform the principal of a demand made by the beneficiary. The reasons advanced by those opposing such a legal obligation included the following: notice to the principal, while customarily given as a matter of courtesy, would, if based on a statutory duty, undermine the independence and integrity of the guarantor's undertaking and would be contrary to the expectation of certain and expeditious payment; it would constitute an open invitation to the principal to try to obstruct payment on capricious grounds, in view of the fact that the bulk of demands were not fraudulent or abusive; compliance with any such duty to notify was not easily proved; notification to the principal could readily be made a documentary condition of the guaranty letter; and an appropriate sanction for non-compliance could not easily be found.

22. The proponents of a statutory duty to notify the principal advanced the following reasons: a provision in the uniform law that was not mandatory would not prompt a dramatic change of what apparently was a widespread current practice; it would leave intact the independent assessment and decision of the guarantor whether or not to honour the claim; notice to the principal was a matter of fairness since the principal was the person most likely to know, and to provide information to the guarantor, about any possible fraud or abuse and since it was ultimately the principal whose funds were at stake.

23. Divergent views were expressed on whether notice would have to be given before payment. Under one view, notice was neither useful nor necessary if made after payment. The prevailing view, however, was that the duty of notification should not be linked in terms of time to the duty of examining the claim and deciding about payment. According to that view, payment could be made (within the time allowed for examination of the claim) before notice was given (within the time period provided therefor), and non-compliance with the duty of notification would not affect the validity or effectiveness of

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4/ The provisions of draft article 10 URDG are reproduced in paragraphs 15 and 25 of this report.

5/ References to articles of UCP are to the text of the 1983 revision, ICC Publication No. 400, reproduced in document A/CN.9/251.

payment but might under certain circumstances lead to a claim for damages. It was noted that the question of damages was still to be considered by the Working Group for this and other possible instances of breach of obligations.

24. With a view to providing the principal with knowledge about a claim without imposing the burden of notification on the guarantor, a suggestion was made to require the beneficiary, either on an opting-in or (for bank guarantees only) an opting-out basis, to present to the guarantor with its claim a (certified) statement that either the original or a copy of the claim had been sent directly to the principal so that the guarantor had documentary proof of the notice before its payment. While attracting some interest, the suggestion was not accepted for the following reasons: it would necessitate a considerable change of current notification practice; it would create unnecessary technical difficulties; the envisaged sanction of prompt dishonour was too rigid; and it created a dichotomy between stand-by letters of credit and bank guarantees that was unwarranted at least in the context of notice to the principal.

Notice of rejection to beneficiary

25. It was noted that draft article 10 (b) URDG dealt with the issue of notice of rejection as follows:

> "If the Guarantor decides to refuse a claim, he shall immediately give notice thereof to the Beneficiary by teletransmission or, if that is not possible, by other expeditious means. Any documents presented under the Guarantee shall be held at the disposal of the Beneficiary."

26. It was stated that a more extensive rule of notification, coupled with sanctions, was found in the practice of stand-by letters of credit as reflected in article 16 UCP.

27. The Working Group was agreed that the uniform law should contain a provision obliging the guarantor to give notice of rejection to the beneficiary. There was wide support for requiring that the notice indicate why the guarantor had decided to refuse payment. However, it was felt that the requirement of giving reasons should be sufficiently flexible to take into account the variety of payment conditions found in guaranty letters. It was suggested that the requirement should be sufficiently general to relieve the guarantor from specifying particular details, as would be appropriate in the different context of commercial letters of credit; it was pointed out, however, that such a rule would be inappropriate for stand-by letters of credit which sometimes required detailed documentation.

28. Divergent views were expressed on whether the uniform law should contain a rule of preclusion along the lines of article 16 (d) and (e) UCP. Under one view, such a rule was inappropriate for guaranty letters since, compared with commercial letters of credit, there tended to be considerably fewer documents and a considerably lesser potential for discrepancies, and the documents did not become "stale" 21 days after the date of the bill of lading (as under article 47 (a) UCP). The prevailing view, however, was that the idea of preclusion might be appropriate in the context of guaranty letters but that the precise conditions and consequences needed further study, taking into account the characteristics and practices concerning stand-by letters of credit and independent guarantees.

Further duties of notification

29. The Working Group considered whether the uniform law should deal with further duties of notification that might form part of the international "rules of traffic", for example, the duty of any financial institution that had received a request for issuing, confirming or advising a guaranty letter to inform the requesting party within a given time about its decision not to comply with that request. The Working Group was agreed that the uniform law should not deal with such duties.

C. Liability and exemption

30. The Working Group considered, on the basis of the discussion set forth in document A/CN.9/WG.II/WP.68, paragraphs 65-72, whether the uniform law should contain provisions on the liability of guarantors and on possible exemptions from liability. It was noted that draft articles 11 to 14 URDG 6/ contained detailed provisions exempting guarantors and instructing parties from liability or responsibility in respect of a great variety of acts or omissions and that draft article 15 URDG limited the effect of these exemptions by imposing liability on guarantors and instructing parties "for their failure to act in good faith and with reasonable care".

Provisions on exemption

31. The Working Group was agreed that the uniform law should not contain any exemption provisions of the kind included in URDG. It was felt that it would not be appropriate to deal with exemption from liability at the statutory level; the issue should be left to the contractual level and settled in uniform rules such as URDG, in general conditions or in individually negotiated agreements. Moreover, an elaborate set of exemption clauses was neither needed nor appropriate in the uniform law, which was certain to contain considerably fewer operational rules or similar provisions on obligations than URDG or UCP.

Rule on liability and its elements

32. Some doubts were expressed concerning the need for including in the uniform law a rule on liability. It was pointed out that questions of liability rarely gave rise to court litigation; that the issue could be left to the general law in a given legal system; that no generally acceptable standard that would also deal with the controversial issue of liability for the conduct of employees could be found; and that the provision of draft article 5 of the uniform law sufficed. 7/ After deliberation, it was agreed, however, that the uniform law should contain a rule of liability along the lines of draft article 15 URDG.

6/ Draft articles 11 to 14 URDG are set forth in document A/CN.9/WG.II/WP.68, para. 65.

7/ Draft article 5, which the Working Group decided to place between square brackets (A/CN.9/342, para. 41), reads as follows:

> "In the interpretation of this Law, regard is to be had to its international [character] [origin] and to the need to promote uniformity in its application and the observance of good faith in international guaranty or credit practice."

33. As regards the elements of the standard of liability, it was agreed that the concept of "good faith" should be retained. As regards the concept of "reasonable care", divergent views were expressed, often depending on whether a mandatory or a non-mandatory rule of liability was envisaged. As regards a mandatory rule from which parties may not derogate by means of exemption clauses, one view was that the standard of reasonable care was appropriate since guarantors were justifiedly expected to exercise professional diligence. As regards a mandatory rule, the prevailing view, however, was that the standard of reasonable care, possibly qualified by a reference to banking practices, was too strict as an unbreakable limit; a mandatory rule of liability should be more restricted, for example, to grossly negligent or reckless conduct.

34. Further suggestions for modifying or supplementing the element of "reasonable care" aimed primarily at an additional liability rule that, according to a widely supported proposal, would not be mandatory and would supplement the draft provision on the standard of care in examining documents that had been discussed at the fourteenth session (see A/CN.9/342, paras. 106-110). The suggestions included references to best banking practices; to good banking practices as generally recognized; to professional diligence; and to banking practices as laid down, for example, in UCP, bankers' manuals and local, national or regional white papers. In response to suggestions referring to banking practices, it was pointed out that the setting of standards could not exclusively and ultimately be left to the persons subjected to the standard; that such banking practices were not everywhere established and often uncertain; and that the reference to the category of persons affected was unnecessary since any standard of care had to be judged in the professional context involved.

Possible extension of liability rule beyond guarantors

35. It was suggested that the future liability rule in the uniform law should be extended beyond guarantors and cover all participants in the guaranty letter transaction, in particular the beneficiary and the principal. It was pointed out that the requirement of good faith was fundamental and should govern the conduct of all parties involved. Moreover, a mandatory liability rule that was limited to guarantors would lead to the wrong conclusion that the uniform law condoned unlimited exemption from liability in respect of the other parties mentioned in the uniform law. A more limited suggestion was that, in view of the fact that the uniform law focused on the guarantor-beneficiary relationship, only the beneficiary should be covered in addition to the guarantor.

36. The prevailing view, however, was to limit the liability rule to guarantors and, possibly, instructing parties. It was felt that an extension of the liability rule beyond those parties would require defining different standards for the respective commercial contexts and addressing the issues of sanctions or remedies; all that would unduly encroach on current national laws that were able to deal with such questions without the help of the uniform law.

III. FRAUD, ABUSE AND SIMILAR CONCEPTS

37. The Working Group considered questions relating to fraud, abuse and similar concepts in the context of guaranty letter transactions. It had before it a note by the Secretariat discussing those concepts and their application in various jurisdictions of common law or civil law tradition (A/CN.9/WG.II/WP.70, paras. 7-75).

38. As suggested in paragraph 9 of that note, the Working Group first considered whether the uniform law should address instances of fraud or abuse that might be relevant otherwise than as an objection to payment. It was agreed that the uniform law should not address such instances of misconduct by persons other than the beneficiary. However, during the subsequent discussion on the fraud exception, a suggestion was made to consider at a later stage the advisability of addressing any possibly fraudulent or abusive conduct of the principal in seeking to prevent payment on capricious grounds.

A. Scope and possible definition of fraud or abuse

39. The Working Group recalled its general agreement at the twelfth session that, while an effort to harmonize the divergent approaches to the problem of fraud would be difficult, there should be greater uniformity in the treatment of the problem and that the formulation of provisions in the uniform law would be a particularly useful contribution (A/CN.9/316, paras. 147-162). The Working Group commenced its harmonization effort with a preliminary exchange of information on currently used concepts and their interpretation in particular jurisdictions.

Exchange of information on currently used concepts

40. As regards the concept of fraud, it was pointed out that its interpretation was often influenced by criminal law notions. The definitions of fraud stated to be applied in particular jurisdictions included the following: causing by illegitimate means a misunderstanding on the part of another person; presenting documents that contain expressly or by implication material representations of fact that the presenter knows to be untrue; disloyal conduct with the intention to do harm or seek an illicit gain or unjust enrichment. It was stated that in other jurisdictions the term "fraud" had a much less strict meaning encompassing situations in which there was no element of intent; with respect to stand-by letters of credit, fraud meant the absence of a colorable basis for drawing on the credit.

41. As regards the concept of abuse, it was pointed out that it was often applied in the same way as in respect of any other right exercised by a person. Such general definitions of abuse stated to be applied in particular jurisdictions included the following: exceeding the limits of the normal exercise of a right by a reasonable person; exercising a right for a purpose other than that for which it was granted. Other definitions of abuse that were geared to the context of guaranty letters included the following: demand by a beneficiary that had received full satisfaction; demand for payment despite the obvious non-occurrence of any contingency or risk covered expressly or impliedly by the purpose of the guaranty letter.

42. It was noted that the concept of fraud as well as that of abuse were not only defined in different ways as indicated above but also gave rise to considerable disparity and uncertainty in their application to individual cases. It was further noted that both concepts were often used interchangeably and that no clear distinction could be drawn between them.

43. Accordingly, it was suggested that an attempt should be made not to use in the uniform law the terms "fraud" and "abuse". It was further suggested that, with a view to finding the necessary precise demarcation line of the limited area warranting an exception to the independent payment undertaking, it was desirable to determine the parameters of that area by discussing borderline cases of a possibly controversial nature.

Discussion of cases to delimit scope of fraud exception

44. A question was raised whether a guaranty letter could be established at such a level of abstraction that would make it "fraud-proof". The Working Group, noting that no jurisdiction allowing such a type of stand-by letter of credit or guarantee could be identified, was agreed that it should certainly be inadmissible under the uniform law. It was recognized, however, that in certain jurisdictions the application of the fraud exception might to some extent be limited by inserting contractual clauses such as conclusive evidence or confession of judgement clauses.

45. Few examples were given of situations that fell squarely within the fraud exception, for instance, forgery of documents or other criminal offences. A suggestion was made that another situation falling within the scope of the fraud exception would be the invalidity or non-existence of an underlying transaction to be secured by the guaranty letter.

46. The Working Group considered the following case that, based on the controversy it aroused, might be qualified as a borderline case: the beneficiary of a performance guarantee without a reduction clause demands payment of the full amount, while having suffered damages of a considerably lower amount resulting from the principal's failure to complete the last phase of a construction project. Under one view, the demand should be regarded as abusive (in respect of the balance between the damages and the guarantee amount) because the amount claimed was grossly disproportionate to the loss suffered and thus excessive as measured by the guarantee purpose or by the level of satisfaction received by the beneficiary. Under another view, the demand should not be regarded as abusive since the fraud exception was limited to total failure of consideration, i.e., total absence of any plausible basis for the demand. If a link between the amount payable under the guaranty letter and the specific loss suffered within the underlying transaction was desired, that should be made clear in the guaranty letter itself. For example, the guaranty letter might contain a reduction clause referring to documented progress of works, or separate guaranty letters for the individual phases of the project might be issued.

47. Another case mentioned with a view to exploring the limits of the fraud exception was that of a performance guarantee relating to a contract for the establishment of a telephone system where the malfunctioning of some telephones led to a dispute between the contracting parties that required the engagement of an expert. One comment made on this case was that, irrespective of whether the malfunctioning of some telephones might be regarded as lack of complete performance, the very need of engaging an expert excluded the application of the fraud exception since the requirement of manifest or obvious abuse without the need for further investigation was not met.

48. The Working Group was agreed that the fraud exception should not apply in circumstances where there was an honest dispute between the parties to an underlying transaction about factual or legal questions concerning performance. It was realized, however, that it was not easy to formulate a precise demarcation line between such contractual disputes and those instances that should fall within the scope of the fraud exception.

Possible criteria and approaches for defining scope of fraud exception

49. The Working Group considered the question, raised in the note by the Secretariat (ibid., para. 75, subpara. 1(a)), whether a general definition of

the fraud exception should be restricted by a subjective criterion (e.g., evil intent, dishonesty, bad faith) or whether it should, following the prevailing judicial attitude, be based on objective criteria that might be more easily established (e.g., lack of plausible basis, purpose of demand falling outside the covered risk). While some support was expressed for a subjective restriction, it was widely felt that such a restriction would not be appropriate.

50. It was noted, for example, that any subjective requirement such as dishonesty or intent to harm was difficult to establish and that it would often be concluded from objective criteria. It was further pointed out that, while objective criteria appeared more appropriate, subjective elements should nevertheless be added as alternative elements that would become relevant, for example, where the beneficiary presented a true statement with a forged signature. It was realized that the distinction between subjective and objective criteria was unclear and of limited use. The Working Group concluded that any further definition might contain subjective as well as objective criteria.

51. Various suggestions were made concerning a possible definition of the fraud exception in the uniform law. One suggestion was to devise a general definition that might be inspired by any of the definitions referred to during the discussions of the Working Group or in the note by the Secretariat. Another suggestion was that an attempt should be made to describe the scope of the fraud exception by a non-exclusive listing of situations, taking into account the cases discussed by the Working Group and the instances of possible abuse referred to in the note by the Secretariat. Yet another suggestion was to combine both approaches and to prepare a general definition accompanied by an illustrative list of instances covered. A last suggestion was not to attempt to formulate any kind of definition but merely to provide a guideline that might refer to various concepts, emphasize the character of the guarantor's undertaking and clarify that the exception covered fraud in the transaction and that the facts constituting the basis for the exception had to be established clearly and convincingly without any investigation.

52. The Working Group requested the Secretariat to prepare alternative draft proposals based on the above suggestions, taking into account the tentative deliberations and conclusions of the Working Group.

B. Degree of awareness or standard of proof

53. The Working Group considered the question of the substantive standard of proof or the degree of awareness entitling the guarantor to refuse payment in case of alleged fraud or abuse. It was agreed that the standard had to be strict in view of the exceptional character of that objection to the independent obligation of prompt payment, taking into account the position and reputation of the guarantor and its need for certainty. The view was expressed that, where a guarantor payed in good faith based on conforming documents, it should be entitled to reimbursement even if there was fraud.

54. As regards the possible terms for expressing the strict standard of proof, support was expressed for any of the similar terms mentioned in the note by the Secretariat (ibid., para. 75, subpara. 2(a)), namely "evident", "certain", "obvious to everyone", "manifest", "established by liquid proof". It was pointed out that "manifest" should be understood as "piercing the eyes". Further suggested terms along the same lines included the following: "without any doubt"; "the only reasonable inference"; or "the only realistic inference".

55. As suggested in the note by the Secretariat (ibid., para. 75, subpara. 2(b)), the Working Group considered whether the above standard should be limited to the issue of the guarantor's refusal on its own motion or whether it should apply equally to court orders enjoining payment by the guarantor or restraining the beneficiary from demanding or receiving payment. It was widely felt that, as a rule, the same standard of proof should apply to both situations, i.e., the decision of the guarantor and the decision of the court. It was realized, however, that the difference between the two situations might lead to certain differences in the application of the standard.

56. It was pointed out, for example, that the guarantor had to take a prompt decision within the time allowed for examination of the claim, while a court might have more time or take its decision at a later time, depending on its particular procedures and functioning. Another difference was that the guarantor usually had to base its decision solely on what had been presented by the principal, while a court might, again depending on its procedures, hear the beneficiary and possibly other parties. Yet another difference was that the guarantor had essentially to rely on documentary proof, while a court might in its summary proceedings admit other means of evidence as well. Moreover, the ordinary standard of proof required in preliminary proceedings was often less than certainty or obviousness by requiring merely the establishment, for example, of a prima facie case or of probable success on the merits.

57. In discussing the possible differences between the decision of the guarantor and that of a court, it was realized that the application of the standard of proof in court proceedings could not be viewed in isolation but had to be seen within the procedural framework that tended to differ from one jurisdiction to another. The Working Group therefore decided at that point of its deliberations to take up the subject-matter of injunctions and other court measures, as discussed in the note by the Secretariat (ibid., paras. 90-114). The Working Group later completed its discussion of fraud, abuse and similar concepts (see below, paras. 67 to 77).

V. INJUNCTIONS AND OTHER COURT MEASURES

58. The Working Group engaged in an exchange of information on the availability and the particular features of injunctive relief in a given jurisdiction, often supplementing the information provided by the note of the Secretariat. It was noted, for example, that not all jurisdictions appeared to provide procedures for injunctive relief to enforce the fraud exception; in one jurisdiction referred to, a court order enjoining the guarantor from paying was available only if the guarantor or the principal had brought a substantive claim against the beneficiary and the court order aimed at securing that substantive claim.

59. It was further noted that there existed considerable disparity as regards the particular stages and the usual timing of procedures for injunctive relief. For example, in one country temporary restraining orders in ex parte proceedings without service of process might be obtained within hours, followed by preliminary proceedings, with stricter procedural requirements, that might last some months, while in another country a preliminary injunction, based on a hearing, could be obtained within a few days. In respect of the different length of the proceedings, it was noted that, while applications for injunctions were reportedly very rarely successful in most

jurisdictions, longer proceedings lent themselves to being abused by principals for dilatory purposes.

60. With a view to reducing the risk of such obstruction, some jurisdictions required applicants to place a bond or security deposit. It was pointed out that this device might usefully be introduced in other jurisdictions as well.

61. A less favourable reception was given to another suggested device which was to order the guarantor, where there was uncertainty about the question of fraud, to put the amount of the guaranty letter into escrow or to pay it into court until the question was finally settled in main proceedings. It was felt that such an order would not accord with the integrity of the guaranty letter and with the restriction of the fraud exception to obvious or manifest cases.

62. The Working Group noted that there existed disparities concerning the specific types of injunctive relief available in various jurisdictions and in respect of the actual use and rate of success of these types. In various jurisdictions, the type of relief most likely to be sought was a stop-payment order against the guarantor. Another type of injunction against the guarantor, available in various jurisdictions, was an order to prevent the guarantor from debiting the account of the principal. The most promising measure in relative terms appeared to be in certain jurisdictions an attachment of the funds that either were still in the hands of the guarantor or formed part of the beneficiary's assets within the jurisdiction concerned. It was pointed out that the least effective measure was to restrain the beneficiary from either demanding or receiving payment, particularly in view of the fact that its place of business was likely to be in a foreign country.

63. Various references were made to particular features of injunctive relief that not only differed from one jurisdiction to another but were also often uncertain or controversial within a given jurisdiction. One such feature was the relationship between preliminary proceedings and main proceedings and any time requirements for initiating any such linked proceedings. A related feature was whether both kinds of proceedings had to be between the same parties. Yet another feature was the possible requirement of a cause of action for the specific type of relief sought and the important question whether the guarantor was not only entitled to refuse payment of a fraudulent call but was under a duty to do so, whether that duty was based on contract or on tort.

64. In the light of the above disparities and uncertainties, it was widely felt that it would be desirable to achieve a greater degree of certainty and uniformity. However, divergent views were expressed as to whether and, if so, what the uniform law could contribute towards that goal. One view was that the uniform law should limit itself to issues of substantive law and not touch upon procedural law matters. The prevailing view, however, was that uniform provisions of substantive law on the fraud exception would be of limited value unless accompanied by harmonized and certain procedural measures and that, therefore, an attempt should be made at furthering that goal without encroaching on the organization of national courts and their traditional procedures.

65. One suggestion was to consider the advisability of a provision that would in general terms deal with the access of all parties to the courts and call for expeditious proceedings, provided that the courts of the given jurisdiction had appropriate rules and procedures. Another suggestion was to make an attempt to lay down guidelines concerning the standard of proof and other features of special relevance in guaranty letter transactions, without

thereby dramatically changing the current procedures and functioning of national courts.

66. As regards any jurisdiction that did not currently provide for injunctive relief at all, a hope was expressed for a possible change in the future. It was agreed, however, that it was unrealistic to try to impose such change by the uniform law. Therefore, the alternative draft provisions that the Working Group requested the Secretariat to prepare on the basis of the above suggestions should be formulated in a manner not mandating any such change.

III. FRAUD, ABUSE AND SIMILAR CONCEPTS (continued)

C. Fraud exception available to counter-guarantor

67. The Working Group resumed its deliberations on fraud, abuse and similar concepts by considering the question, raised in the note by the Secretariat (ibid., para. 75, subpara. 3), what special considerations applied to the fraud exception available to a counter-guarantor (first bank) in cases involving fraud or abuse by the ultimate beneficiary. The situation envisaged was that of a payment demand by the counter-guarantor's beneficiary (second bank) that had received from the ultimate beneficiary a demand for payment under its indirect guaranty letter. The specific questions raised in the note by the Secretariat were whether any fraud or abuse by the ultimate beneficiary should be relevant where there was no collusion between the ultimate beneficiary and the second bank, and, if so, what the requirements should be for recognizing the ultimate beneficiary's conduct as a basis for the fraud exception available to the counter-guarantor/first bank.

68. In discussing those questions, it was agreed that the guaranty letters issued by the first and the second bank were separate and independent undertakings that often differed as regards their terms and conditions for payment. As indicated in paragraph 66 of the note by the Secretariat, the issue of fraud or abuse as an objection to payment under the counter-guaranty letter would be determined exclusively within the relationship between the two banks, taking into account the purpose of the counter-guaranty letter to indemnify the second bank according to the terms and conditions of that guaranty letter. Accordingly, any fraud or abuse by the ultimate beneficiary could not as such be imputed to the second bank but could become relevant only in the context of a fraudulent or abusive demand by that bank against the first bank.

69. Divergent views were expressed as to the conditions under which a demand by the second bank would be abusive so as to entitle the first bank to refuse payment. One view was that the fraud exception should be limited to the case of collusion between the ultimate beneficiary and the second bank. Another view was that the second bank's demand was abusive if it knew before payment of the fraud by the ultimate beneficiary. Yet another view was that the second bank was not entitled to reimbursement if it had acted negligently, i.e., failed to exercise professional care. A further view was that the second bank was entitled to reimbursement if it had acted in good faith. Additional requirements suggested were that the misconduct of the ultimate beneficiary constituted an objection to payment under the law applicable to the second bank's undertaking or that it led to a recognized duty of the second bank to refuse payment.

70. In view of the fact that these additional requirements referred to legal issues possibly to be determined under foreign, uncertain laws, concerns were expressed that the question of the fraud exception available to the counter-guarantor might be too complicated to be dealt with appropriately in the uniform law. Another reason advanced against addressing that question was that, for lack of specificity, the situation was appropriately covered by the general provisions on the fraud exception, as discussed earlier by the Working Group. It was stated in reply that the very issues showed a need for provisions covering that special situation.

71. After deliberation, the Working Group decided to reconsider at its next session, on the basis of draft provisions prepared by the Secretariat in the light of the above suggestions, whether the uniform law should contain a special provision on the fraud exception available to the counter-guarantor.

D. Persons against whom the fraud defence may not be invoked

72. The Working Group, responding to a question raised in the note by the Secretariat (ibid., para. 75, subpara. 4), was agreed that there was no need for indicating in the uniform law the kind of persons against whom the fraud defence might not be invoked.

E. Possible provision on "extend or pay" requests

73. The Working Group noted that "extend or pay" requests had been listed in the note by the Secretariat as a possible source of abuse under certain circumstances (ibid., paras. 51-54) and that, apart from that context, consideration by the Working Group was invited on whether the uniform law should contain a provision dealing with such requests, possibly along the lines of draft article 26 URDG, which read as follows:

> "If the Beneficiary requests an extension of the validity of the Guarantee as an alternative to a claim for payment submitted in accordance with the terms and conditions of the Guarantee, the Guarantor shall without delay so inform the party which gave the Guarantor his instructions. The Guarantor shall then suspend payment of the claim for such time as is reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such extension to be issued.
>
> "Unless an extension is granted within the time provided by the preceding paragraph, the Guarantor is obliged to pay the Beneficiary's conforming claim without requiring any further action on the Beneficiary's part. The Guarantor shall incur no liability (for interest or otherwise) should any payment to the Beneficiary be delayed as a result of the above-mentioned procedure.
>
> "Even if the Principal agrees to or requests such extension, it shall not be granted unless the Guarantor and the Instructing Party(ies) also agree thereto."

74. It was noted that "extend or pay" requests were frequently encountered in guarantee practice. It was pointed out that no such practice existed regarding stand-by letters of credit and that an "extend or pay" request in the context of stand-by letters of credit would be regarded as a request to amend. As indicated in the note by the Secretariat (ibid., para. 52), there existed a variety of possible motives for "extend or pay" requests; whether

a given request was made in good faith or in bad faith was usually difficult to judge, especially by the guarantor. Notice to the principal was therefore deemed necessary, in addition to the reason that a guarantor wanted the principal's consent to any extension of the validity period of the guaranty letter.

75. While recognizing the potential problems created by "extend or pay" requests, divergent views were expressed as to whether the uniform law should deal with that problem otherwise than as a possible source of abuse. One view was that the problem should not be addressed at the statutory level but should be left to the agreement of the parties, including any general conditions or uniform rules such as URDG. Another view was that the problem was sufficiently vexing and crucial to warrant its treatment in the uniform law; however, it might be dealt with less elaborately than in draft article 26 URDG and might be confined to the following principles: requirement of notice to principal; requirement of principal's consent to extension; principal's consent or request not binding on guarantor; suspension of payment and obligation to pay in case of non-extension only if the payment demand was in conformity with the terms and conditions of the guaranty letter.

76. It was noted that these principles were adopted by draft article 26 URDG. Concerns were expressed, however, in connection with the time of suspension provided for in that draft article and its implications as regards the time allowed for examining the demand and on the expiry date. It was suggested that consideration should be given to replacing the uncertain formula of "reasonable time" by a fixed time period and to clarifying the implications of the suspension in any future provision of the uniform law. The view was expressed that the guarantor (or counter-guarantor) should in no circumstances be required to extend the guaranty letter (or counter-guaranty letter) without having consented to the extension and that the running of the validity period should not be suspended by a request for extension.

77. After deliberation, the Working Group decided to reconsider the matter on the basis of draft provisions by the Secretariat.

IV. OTHER OBJECTIONS TO PAYMENT

78. The Working Group considered whether the uniform law should contain provisions on other objections to payment, as discussed in the note by the Secretariat (ibid., paras. 76-89).

A. Invalidity, voidability or unenforceability of payment obligation

79. The Working Group discussed some cases of invalid, voidable or unenforceable payment obligations. Reference was made, for example, to national or international prohibitions of funds transfers and to the problem of a payment obligation in a non-convertible currency unavailable at the place of payment.

80. While recognizing the importance of such issues and problems, the Working Group was agreed that the uniform law should not contain any special provisions dealing with instances of invalidity, voidability or unenforceability of payment obligations under guaranty letters.

B. Set-off with claims of guarantor

81. Divergent views were expressed as to whether the uniform law should deal with the question of set-off against a demand for payment under a guaranty letter. One view was that the matter should be left to the agreement of the parties within the framework of the applicable national law. It was felt that the uniform law could not appropriately address all the complex issues, including the substantive and procedural requirements of set-off that varied from country to country. Another view was that the uniform law should contain provisions that would help to overcome the existing disparities and uncertainties, while giving full autonomy to the parties and not encroaching on laws governing bankruptcy or insolvency.

82. As regards the possible contents of any future provision in the uniform law, it was widely felt that the guarantor should not be entitled to a set-off with claims assigned to it by the principal. As regards the guarantor's own claims, divergent views were expressed (along the lines of the different views reported in paragraphs 83 to 85 of the note by the Secretariat). One view was to disallow set-off since the guarantor should not be guided by its own interest and the beneficiary justifiably expected actual payment. Another view was to allow set-off since it was not contrary to the independent nature of the undertaking and there was no reason for treating a guaranty letter differently from a bill of exchange. An intermediate view was to allow set-off in certain circumstances.

83. After deliberation, the Working Group decided to reconsider the matter on the basis of draft provisions prepared by the Secretariat in the light of the above views.

VI. CONFLICT OF LAWS AND JURISDICTION

84. The Working Group had before it a note by the Secretariat discussing conflict of laws and jurisdiction as possible further issues of the uniform law (A/CN.9/WG.II/WP.71).

A. Preliminary discussion on appropriateness of including in the uniform law provisions on conflict of laws and jurisdiction

85. The view was expressed that it would be inappropriate to consider the inclusion of provisions on conflict of laws and jurisdiction in the uniform law that was devoted to substantive law matters. Provisions of that kind would be particularly inappropriate if the uniform law were to be adopted in the form of a convention since such a convention would establish the requirements for its own application. Only a separate convention on the law applicable to international guaranty letters could regulate in sufficient detail the many complicated questions concerning, for example, the modalities of choice-of-law clauses and the clear delimitation of the scope of the applicable law. In view of the complexity and difficulty of the subject matter, appropriate provisions could be formulated only in a different forum (e.g., another UNCITRAL working group) or by a specialized organization such as the Hague Conference on Private International Law. Yet another reason advanced against the inclusion of provisions on conflict of laws and jurisdiction in the uniform law was that there was no need for such provisions in view of the fact that issues of conflict of laws or jurisdiction rarely gave rise to problems in practice, as evidenced by the dearth of relevant court decisions.

86. It was stated in reply that it was appropriate to consider the possibility of including in the uniform law provisions on conflict of laws and jurisdiction. There existed an inner link between those matters and the previously discussed substantive law issues, including possible court measures. There was also an element of timing involved, in view of the various ongoing unification efforts in the field of guarantees and letters of credit. It was deemed useful at least to discuss the issues raised in the note by the Secretariat with a view towards identifying problems and pondering possible solutions. After that discussion, an informed decision could be taken on whether the uniform law should contain some provisions on conflict of laws and jurisdiction or whether the matter should, for example, be recommended to be taken up by the Hague Conference on Private International Law. A view was expressed that, following the approach adopted by the 1930 Geneva Conventions on Bills of Exchange and Promissory Notes, a separate convention on conflict of laws could be prepared, in addition to the substantive uniform law currently under preparation, and that this task could well be accomplished by UNCITRAL itself, using some form of co-operation with the Hague Conference on Private International Law.

87. After deliberation, the Working Group decided to discuss the issues relating to conflict of laws and jurisdiction, in the expectation that such a discussion, which would in itself be of use, would be of help to the later decision of the Working Group on any future course of action concerning the regulation of those issues.

B. Relationships to be covered by possible conflict-of-laws rules

88. The Working Group considered which relationships should be covered by conflict-of-laws rules if it was later decided that such rules were to be included in the uniform law. The Working Group agreed with the suggestion in the above note by the Secretariat (ibid., para. 10) that the focus should be on the relationship between guarantor and beneficiary, covering the relationship between any kind of guarantor (e.g. indirect guarantor, counter-guarantor, confirming guarantor) and its beneficiary.

89. In response to the question raised in paragraph 11 of the note by the Secretariat, the Working Group was agreed that no other relationship than that between a guarantor and its beneficiary should be covered.

C. Designation of applicable law

90. The Working Group reaffirmed its agreement at the twelfth session (A/CN.9/316, para. 164) that any possible provisions on conflict of laws should be composed of two elements: recognition of party autonomy to choose the applicable law, and determination of the applicable law failing agreement by the parties.

1. Freedom of parties to choose applicable law

91. The Working Group considered whether the parties' freedom of choice should be unlimited or whether the law chosen by the parties should have a certain connection with the guaranty letter transaction. While there was some support for requiring a certain connection or precluding an unreasonable choice, it was widely felt that the freedom of the parties should be unlimited since any kind of limitation would create undesirable uncertainty and because there was a practical need to allow parties to choose a law that bore no

connection with the transaction, for example, because it was perceived as neutral or particularly refined.

92. As suggested in paragraphs 18 to 21 of the note by the Secretariat, the Working Group considered the form and modalities of the choice by the parties. It was noted that in respect of those issues account should be taken of the characteristics of the guaranty letter, including its independent and formalistic nature and the fact that, at least from a practical point of view, the choice of the law was not always effected by a genuine agreement of both parties.

93. While a suggestion was made to recognize only an express choice, it was widely felt that that requirement would be too strict. Various suggestions were made as to which non-express modalities of choice should be allowed. One suggestion was to use the formula of article 3 (1) of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980): "The choice must be expressed or demonstrated by the terms of the contract or the circumstances of the case." Other suggestions that were made with reference to the above characteristics of the guaranty letter included the following: to use the formula of the 1980 Rome Convention but without the words "or the circumstances of the case"; to adopt the formula of article 2 of the 1955 Hague Convention on the Law Applicable to International Sales of Goods and require that the choice be by "an express clause or result without doubt from the terms of the contract"; to provide that the choice of law "may be implied from the terms of the guaranty letter".

94. In response to the question raised in paragraph 21 of the note by the Secretariat, the Working Group was agreed that there was obviously no need to include in the uniform law a statement to the effect that any choice-of-law clause found in another relationship had no bearing on the issue of the law applicable to the guarantor-beneficiary relationship.

2. Determination of applicable law failing choice by the parties

95. As regards the possible content of a provision determining the applicable law in the absence of a choice by the parties, it was noted that the solution prevailing in most jurisdictions was the law of the guarantor's country. The Working Group adopted that solution as the basic rule, with a qualification for those cases where the guarantor (or counter-guarantor) had more than one place of business, as suggested in paragraph 27 of the note by the Secretariat.

96. On the basis of the discussion in paragraphs 28 to 35 of that note, the Working Group considered whether the above basic rule might be refined for those cases where, in addition to one guarantor, another bank was involved either as another guarantor or as an advising bank or paying agent. The primary question considered was whether in such cases the obligations of the various banks involved should, in the absence of choice-of-law clauses, be governed by a single law.

97. The first situation considered was that of an indirect guaranty letter that was counter-guaranteed by the instructing party. A view was expressed that it might be desirable for the sake of consistency and certainty to apply to both guaranty letters a single law which, according to one suggestion, should be that of the counter-guarantor as the last link in the guarantee chain and, according to another suggestion, that of the other guarantor as the one from whom the ultimate beneficiary would demand payment. However, it was

widely felt that it was neither practical nor justified to accord statutory priority to one of two possibly differing laws and impose the law of one guarantor on another one. Such an imposition would undermine the independent character of the two, or possibly more, separate undertakings, while parties, if they wished a single law to govern, could achieve that result by appropriate choice-of-law clauses.

98. The next situation considered was that of a guaranty letter that was confirmed by a bank in another country. It was noted that in that situation, found less frequently in respect of bank guarantees than stand-by letters of credit, the beneficiary could demand payment from the confirming or the issuing guarantor, unlike in the counter-guarantee situation where the ultimate beneficiary could not demand payment from the counter-guarantor. While recognizing that special feature of the case of confirmation, the Working Group was agreed that the uniform law should not impose a single law on both the issuing and the confirming guarantor.

99. The next situation considered was that of the involvement of an advising bank. It was noted that the types of involvement differed considerably in practice, ranging from the mere function of notification or of forwarding documents to greater responsibilities such as examining the claim and effecting payment on behalf of the guarantor. The Working Group was agreed that, even in cases of such greater responsibilities, the above basic rule pointing to the guarantor's (or counter-guarantor's) place of business should be retained. It was stated, in that connection, that "the place of payment" was not an appropriate connecting factor since it constituted an uncertain legal concept and might create practical difficulties, particularly if the place of payment was not clearly stated in the guaranty letter. As regards the function of examining claims, a suggestion was made to explore possible methods of achieving the application of local standards of examination.

100. Finally, the Working Group considered whether a single law should govern the whole socio-economic network of contracts related to guarantee transactions, including not only the various guarantor-beneficiary relationships but also the relationships between the principal and the issuing guarantor and between the principal and the beneficiary. The Working Group was agreed not to impose a single law on such a global network of contractual relationships.

101. A suggestion was made, in that connection, that any future conflict-of-laws rule in the uniform law should introduce a degree of flexibility as done by article 4(5) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations according to which the presumption in favour of the place of business of the party that was to effect the characteristic performance would be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. It was stated in reply that such an escape clause, apart from forming part of an elaborate scheme of presumption, would not be appropriate for guaranty letters in view of their special characteristics, namely their independent and formal nature as well as their mode of establishment. It was realized that it might be difficult for a State that adhered to the 1980 Rome Convention to accept a different conflict-of-laws rule and that that difficulty might shape its position on the general question of whether the uniform law should include conflict-of-laws provisions at all. It was also realized that the 1980 Rome Convention dealt generally with contractual obligations and, as indicated by the fact that it excluded bills of exchange, might not appropriately address the specifics of guaranty

letters; that there existed within that Convention a mechanism for later changes; and, above all, that the universal composition of the Working Group necessitated due regard to the interests of States not adhering to that Convention. A concern was expressed that, if the discussion of a particular region's laws were to continue, other countries might wish to discuss other regional bilateral or multilateral conventions or limitations.

3. Scope of applicable law

102. The Working Group took note of the discussion on the scope of the applicable law set forth in paragraphs 36 to 41 of the note by the Secretariat. It was understood that the issues mentioned therein were meant to be illustrative of the kind of questions governed by the law determined according to the possible conflict-of-laws rule in the uniform law and were primarily designed to assist the Working Group in finding an appropriate formula for indicating the scope of the applicable law.

103. As regards such a possible future formula, the Working Group favoured the approach suggested in paragraph 43 of the note by the Secretariat, i.e., to refer to "the rights and obligations arising out of a guaranty letter", with possible exceptions for issues falling outside the scope of the applicable law and with possible clarifications concerning the inclusion of issues that not everyone might expect to fall within the scope of the applicable law. Various drafting suggestions were made, including the following: to mention in addition to "rights and obligations" also "defences" and, taking into account the counter-guarantee and agency relationships between the counter-guarantor and the guarantor, to widen the notion of "arising out of the guaranty letter" by wording such as "or relating to".

D. Jurisdiction

104. The Working Group recalled its preliminary discussion on the appropriateness of including in the uniform law provisions on conflict of laws and jurisdiction (see above, paras. 85-87). The following additional points were made in respect of possible rules on jurisdiction.

105. The view was expressed that the subject matter of court jurisdiction was particularly complex and complicated and that only a very detailed regulation could do justice to that complexity. There existed already satisfactory and detailed regulations of that subject matter in multilateral treaties (e.g. the 1968 Brussels and 1988 Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters). Moreover, the question of court jurisdiction had hitherto not been dealt with in conventions devoted to other subject matters. It was also observed that the Hague Conference on Private International Law, despite its specialization in that subject matter, had essentially limited its unification efforts to an indirect treatment such as recognition of court judgements.

106. It was stated in reply that the subject matter of jurisdiction was of considerable practical importance and that its treatment in the special context of guaranty letters would be useful, for example, as regards the validation of an arbitration or choice-of-forum clause in the guaranty letter which, as a rule, was not signed by the beneficiary. As regards the existence of multilateral treaties on the subject, it was stated that that should not preclude the inclusion of provisions on jurisdiction in the uniform law,

taking into account the interests of those States not adhering to those treaties. The interests of the States adhering to those treaties could well be accommodated by reservation clauses if the uniform law were to be adopted in the form of a convention. It was further pointed out that there existed a number of conventions, especially in the area of transport, that contained provisions on jurisdiction and arbitration.

107. Without taking a decision on whether provisions on jurisdiction should be included in the uniform law, the Working Group exchanged views on the issues discussed in the note by the Secretariat. The Working Group was agreed that, as discussed in paragraphs 46 to 50 of that note, arbitration or forum clauses should be allowed. One suggestion was to clarify that there was no need to effect such choice by a clause contained in the original guaranty letter and that it could be effected at any time by a separate agreement. Another suggestion was to allow parties to empower arbitrators to decide their dispute according to rules of law such as an internationally agreed uniform law or international customs or uniform rules.

108. As regards the determination of jurisdiction failing a choice by the parties, as discussed in paragraphs 51 to 55 of the note by the Secretariat, strong reservations were expressed against providing for exclusive court jurisdiction. It was stated in reply that exclusive jurisdiction of the courts in the guarantor's country would be advantageous in that the courts would be able to apply their own, familiar law, according to the above basic rule on the applicable law (see para. 95), and that the enforcement of any decision against the guarantor as the most likely defendant was ensured.

109. Finally, the Working Group considered the suggestion, set forth in paragraphs 56 to 58 of the note by the Secretariat, that any provision on jurisdiction might be expanded so as to cover the principal as the most likely party to initiate proceedings. The view was expressed that such expansion would be inappropriate since neither the substantive law provisions nor any possible conflict-of-laws provisions of the uniform law dealt with the principal-guarantor relationship. Another view was that, since certain issues relating to the principal and possibly injunctions brought by the principal might be addressed by the future uniform law, consideration might be given to ensuring in some way that all principals, including foreign ones, had access to the court that would have jurisdiction under the uniform law.

110. The Working Group decided to reconsider the appropriateness of including provisions on jurisdiction in the uniform law. It requested the Secretariat, for that purpose, to prepare tentative draft provisions in the light of the above deliberations and to consult with the Hague Conference on Private International Law on possible methods of co-operation in that field.